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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-116

RALPH D. ROCKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF BY PETITIONER

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Table of Contents

	PAGE
Reply Brief	1

Table of Authorities

Cases

McIntosh v. United States, 385 F.2d 274 (8th Cir., 1967)	3
Turf Center, Inc. v. United States, 325 F.2d 793 (9th Cir., 1964)	3
United States v. Altobella, 442 F.2d 310 (7th Cir., 1971)	2
United States v. Archer, ... F.2d ... (2d Cir., 1973)	2
United States v. D'Amato, 436 F.2d 52 (3rd Cir., 1970)	3
United States v. Nardello, 393 U.S. 286	3
United States v. Salsbury, 430 F.2d 1045 (4th Cir., 1970)	2
United States v. Stagman, 446 F.2d 489 (6th Cir., 1971)	3

Statutes

Travel Act, 18 U.S.C. §1952	3

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1. The Government's Brief in Opposition attempts to mask the serious weaknesses in its position with respect to the procedure for conducting hearings on juror misconduct which was approved by the courts below. The Government reverses, curiously, the order of the questions presented, framing its own with respect to the hearing procedure and addressing itself to those questions only in a cursory argument toward the end of its Brief. In this manner the Government seeks to justify the rule that when a substantiated allegation of jury misconduct is made, a court may deny counsel the right to examine the jurors personally, ask only such questions as it desires, and then find that the evidence

does not sustain the allegation on the basis of the fragmentary record adduced from its limited questioning.

To accept the Government's contention, and to permit the opinions below to remain undisturbed, is to ring the death knell on the highly desirable conduct, exemplified by the Petitioner's defense counsel, of reporting possible juror misconduct to the court promptly after its discovery. In 44 states (including Virginia) and the District of Columbia, counsel may by law interrogate jurors *ex parte* and report the matter to the court only upon the conclusion of the inquiries. This approach is far less protective to jurors than recourse to the Court followed by court-supervised examination of jurors by counsel. Nevertheless, many counsel will feel required to engage in *ex parte* interviews if the alternative is the kind of hearing sanctioned by the court below which precludes the type of inquiry required to establish misconduct. Both the equities of the case at bar and sound policy for the future, therefore, require that this Court strike down the procedure adopted by the lower courts in this case.

2. The Government cannot escape the conflict between the holdings of the Fourth Circuit, as represented by the instant case and *United States v. Salsbury*, 430 F.2d 1045 (1970), and those of the Seventh and Second Circuits in *United States v. Altobella*, 442 F.2d 310 (1971), and *United States v. Archer*, ... F.2d ..... (1973). *Altobella* and *Archer* both recognize, expressly, the existence of the genuine disagreement as to the reach of the Travel Act. It does no good, moreover, to attempt to inflate the interstate aspects of the case, as the Government also tried unsuccessfully in *Archer*, by alluding to non-criminal transactions which might have crossed state lines. The present case involves a single charge, the transportation in December, 1964, of a check from the District of Columbia to a Maryland suburb. The Government's effort to bolster its position here, by referring

to several trips to Florida and the Bahamas, is wholly inappropriate, for the Government itself had conceded in the district court that these trips did not constitute bribes, that they were not charged as such and that they amounted to no more than permissible business entertainment (Tr. 1860; 3261-65). The Government's own witnesses, furthermore, testified that the trips were wholly unrelated to Petitioner's zoning applications (Tr. 676, 679, 858, 873, 879, 880, 886, 910-15).[1] The Government seeks to justify its position in this Court, therefore, upon an entirely different basis from that on which the conviction was obtained.

3. The Government's primary contention, in answer to our argument that unresolved questions of Maryland bribery law should have been certified to the highest court of that state, is that we overstate the role of state law in the offense proscribed by the Travel Act. As one of its principal authorities for minimizing the importance of state law, the Government has cited *McIntosh v. United States*, 385 F.2d 274 (8th Cir., 1967). Overlooked, however, are the statements of Judge Matthes for the court there, that "Indeed, the indictment would probably be subject to attack if it failed to allege the state crime the accused had intended to violate by means of an interstate facility", and that "the 'unlawful activity' . . . must be one defined and proscribed by state law . . ." (385 F.2d 274, 276, 277). These statements make clear the rule that there can be no conviction under

[1] Similarly, the Government can derive no benefit from its statement that certain furniture, which the Petitioner had given to Mr. Baggett as a Christmas gift in December, 1965, has been purchased by way of a check which had also travelled between the District of Columbia and a Maryland suburb (Brief in Opposition, p. 15). The statement cleverly avoids reference to the fact that the furniture had been purchased months earlier, for use in a model apartment in Maryland, and that, only after the model was closed, was the furniture moved from one point in Maryland to another (GX 317; Tr. 1312-13; 1456; 1472-81; 1584-90; 2575-89).

the Travel Act unless the use of interstate facilities is shown to have been in aid of a pre-existing violation of state law or, at the very least, as a step toward an objective which, if accomplished, would have amounted to a violation of state law. See also, to the same effect: *United States v. Nardello*, 393 U.S. 286; *Turf Center, Inc. v. United States*, 325 F.2d 793, 796 (9th Cir., 1964); *United States v. D'Amato*, 436 F.2d 52 (3rd Cir., 1970); and *United States v. Stagman*, 446 F.2d 489, 492, 493 (6th Cir., 1971).

Respectfully submitted,

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